Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-1765

JAMES EDWARD RIEBSCHLAEGER, PETITIONER

V.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

James Edward Riebschlaeger, Petitioner

v.

The United States of America, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Petitioner respectfully prays that a writ of certiorari issue to review the judgment entered March 18, 1976, and order denying rehearing entered May 5, 1976, of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion of the Fifth Circuit has not yet been reported. A copy of the opinion is appended to this petition in the Appendix at page 16.

Jurisdiction

The opinion of the Fifth Circuit was delivered on March 18, 1976. Petitioner's motion for rehearing was denied

on May 5, 1976. A copy of the Fifth Circuit's order is appended to this petition in the Appendix at page 18. Petitioner's motion for stay of mandate was denied on May 14, 1976. A copy of the Fifth Circuit's order is appended to this petition in the Appendix at page 19.

Questions Presented

I. Whether or not the warrantless arrest and subsequent search of petitioner was based on probable cause as required by the Fourth Amendment of the United States Constitution.

II. Whether or not the prior jury service in similar cases with the same attorneys as in this case violated petitioner's right to an impartial jury as required by the Sixth Amendment to the United States Constitution.

Constitutional Provisions Involved

Fourth Amendment of the United States Constitution "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized."

Sixth Amendment of the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement

This is an appeal from the conviction of James Edward Riebschlaeger for possession and conspiracy to possess marihuana with the intent to distribute. On September 7, 1973, a two count indictment was returned charging Riebschlaeger with the above crimes. (R 598-599). On November 9, 1973, Riebschlaeger filed a motion to suppress the marihuana seized from him at the time of his arrest on the basis that the arrest and search were without probable cause. (R 605-606). On November 26, 1973, the Government filed a reply to Riebschlaeger's motion to suppress claiming

the search was based on probable cause. (R 622-623).

A hearing before the trial judge was held on Riebschlaeger's motion to suppress on February 24, 1975. (P 29-97). The trial judge overruled Riebschlaeger's motion to suppress on February 25, 1975. (R 98). A jury was selected for the trial of the case the same day. (R 99-152). During the selection proceedings Riebschlaeger moved to quash the jury panel on the basis of their prior jury service. (P 103-104). The trial court denied the motion. (R 104). Riebschlaeger renewed his motion to quash by a written motion filed on March 3, 1975. (R 640-641).

Trial to a jury commenced on March 4, 1975, in this case. (R 136). The jury returned verdicts of guilty on March 6, 1975, against Peibschlaeger on both counts. (R 591-593). On April 11, 1975, the trial court sentenced Riebschlaeger to four years imprisonment with a special parole term of four years on both counts to run concurrently. (R 70 -702). Riebschlaeger gave notice of appeal the same day. (R 698-699).

At the motion to suppress hearing customs agent Charles R. Miller testified that on or about May 21, 1973, he

received information from someone at Coastal Bend Flying Service that Riebschlaeger had told them that he was going to fly one of their rental aircraft to a certain destination but had actually flown the plane elsewhere. (R 31-32). Miller then checked the customs agency files and discovered a report stating that another customs agent had detected the odor of marihuana in a plane registered to Riebschlaeger although nothing in the report indicated that Riebschlaeger was present or otherwise connected him with any illegal activity. (R 32-34, 55-60).

On May 29, 1973, Miller received information from Coastal that Riebschlaeger had rented an airplane for a trip. (R 34-36). The next day Miller received information from Coastal that the plane had been returned. (R 34-35). Miller asked the people at Coastal not to let anyone into the aircraft until he could inspect it. (R 35). Miller inspected the aircraft and found two or three seeds and a few pieces of leaves which he believed to be marihuana although he didn't have the material tested. (R 34-35, 62). Agent Miller made no effort to determine who else had previously rented the aircraft before Riebschlaeger. (R 63-64).

Sometime prior to June 5, 1973, Miller received information from Coastal that Riebschlaeger had paid his outstanding bill of $500.00 and inquired about renting a plane for a trip to Mexico on June 5, 1973. (R 35). Miller then decided to set up a surveillance on Riebschlaeger using two customs aircraft and several other customs agents. (R 36-37, 64). The agents observed Riebschlaeger fly from Robstown alone to Kingsville and land at Kingsville for about five to ten minutes. (R 36-37, 65-70). Then Riebschaleger flew from Kingsville to Harlingen and landed there for about thirty minutes. At Harlingen the agents observed Riebschlaeger and a passenger he had apparently picked up in Kingsville, Ruben Cortez Alaniz, each made phone calls from phone booths in the main terminal area. (R 38, 71-75). From Harlingen Riebschlaeger flew to and landed after dark at Westlaco for three to five minutes where a car met the plane or at least car taillights flashed by the aircraft. (R 38-39, 75-77). Then Riebschlaeger flew from Westlaco to Kingsville, landed and parked the aircraft away from the normal ramp area for transient aircraft and cut off its engines. Miller had been informed by tower personnel at Kingsville that they had seen the same aircraft park away from the normal ramp

area before. However, they did not identify the plane's pilot on such occasions. Alaniz reached into the back of the plane and exited with a large dark bag and either walked, ran, or ran with the intention of hiding the bag in the direction of the agents. At that point Miller decided to arrest Riebschlaeger and Alaniz. The agents came out of their hiding places, identified themselves and their purpose and arrested Alaniz and Riebschlaeger and seized the bag. (R 39-44, 78-90).

During his investigation Miller was aware that Riebschlaeger operated an airplane banner towing business and flew people around using planes rented at Coastal (R 51-52) and that Riebschlaeger was not a known drug trafficker. (R 53). Also, Alaniz was not known to Miller in any way prior to the time of his arrest. (R 79-80).

At the beginning of the jury selection proceeding after the trial court announced that the defendants would have ten joint strikes and four individual strikes each, Riebschlaeger's attorney orally moved to quash the panel on the basis that at least twenty four of the jurors had already served on two juries which had returned verdicts of guilty and twelve of those had been on a jury that had

returned a verdict of guilty against a client represented by Riebschlaeger's attorney. (R 103-104). The trial court denied the motion. (R 104). Subsequently, the panel members were asked by the trial judge whether their prior service would prevent them from being impartial in this case. None responded. (R 121-122). Upon further inquiry it was developed that almost all of the panel members had served on juries before. (R 127-133).

After the jury was selected, but prior to the start of the trial, Riebschlaeger's attorney filed a motion to dismiss the jury. The motion stated that Riebschlaeger had to select a jury from a panel almost all of whom had sat in criminal cases in which the prosecutor in this case was the prosecutor and resulted in convictions and twelve of whom had already found a client of Riebschlaeger's attorney guilty thus damaging the creditibility of Riebschlaeger and his attorney. The motion further stated that Riebschlaeger's attorney had insufficient premptory challenges to strike all such jurors and that Riebschlaeger's right to an impartial jury was denied by having to accept such jurors. (R 640-641). The trial court denied the motion. (R 136).

Reasons for Granting the Petition

I.

The Supreme Court has not considered a case involving probable cause for a search and seizure in the factual context of an airplane search. This issue, also, involves one of our most important federal constitutional guarantees, i.e. the right to be free from unreasonable searches and seizures under the Fourth Amendment. Therefore, a substantial question is presented for the Supreme Court's consideration.

The constitutional validity of the search and seizure of the bag of marihuana depends on the constitutional validity of the arrest of Riebschlaeger and Alaniz. The constitutional validity of the arrest "depends in turn upon whether, at the moment the arrest was made, the (custom agents) had probable cause to make it--whether at that moment the facts and circumstances, within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believeing that (Riebschaleger and Alaniz) had committed or (were) committing an offense." Beck v. State of Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964).

The facts upon which customs agent Miller relied were:

> (1) The information from Coastal Bend Flying Service that Riebschlaeger sometimes flew to destinations other than to where he had announced his intention to fly.
>
> (2) The seeds and pieces of leaves found in the airplane Riebschlaeger had rented after Riebschlaeger had returned it.
>
> (3) The surveillance of Riebschlaeger's flight around south Texas on June 7, 1973.

Miller apparently did not rely on the report from the other customs agents about the marihuana odor in Riebschlaeger's plane or the other information brought out in his testimony. (R 63).

Changing his destination from a previously declared intention does not in itself indicate any illegal activity on Riebschlaeger's part. How often does some last minute unexpected development cause a traveler whether by land, sea or air to legitimately change his travel plans? It happens hundreds of times every day in hundreds of places.

Finding seeds and a few pieces of leaves in a rental aircraft does not indicate any illegal activity on Riebschlaeger's part, either. First, two or three seeds and pieces of leaves is scant material on which to base a conclusion that

the material is contraband. Miller might very well have been mistaken in the absence of some scientific conformation. Second, the material could very well have been left in the plane by someone else at some other time. The aircraft was a rental aircraft. No effort was made by Miller to check the plane out before Riebschlaeger used it to assure it was free of contraband immediately before Riebschlaeger used it. No doubt a careful examination of all rental cars, boats, and planes in this country would reveal thousands with a few seeds and leaves which might be marihuana.

The surveillance of Riebschlaeger's flight indicated nothing in the way of illegal activity. All the agents saw was Riebschlaeger flying a passenger around south Texas, making a phone call, maybe meeting someone in a car, and the passenger Alaniz getting out of Riebschlaeger's plane with a nondiscript bag. The agents didn't see Riebschlaeger meet with any known drug trafficker nor any other indication of drug trafficking. Apparently realizing how weak his whole case was Miller changed his testimony from Alaniz walking from the plane to running and later to running to hide the bag, which might be a suspicious

activity but hardly amounts to probable cause.

Taking all of the above facts together they do not amount to enough trustworthy information to warrant a prudent man in believeing that Riebschlaeger was committing or had committed an offense especially since the agents knew Riebschlaeger was in the business of flying people around. To allow federal officers to arrest and search any traveler who after saying he was going one way went another way in a rental vehicle in which some minute amount of contraband had possibly been detected after the traveler had traveled around awhile doing nothing to indicate illegal activity "would be to leave law-abiding citizens at the mercy of the officer's whim or caprice." Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949).

An interesting comparison with this case is provided by United States v. Ciavocco, 384 F. Supp. 1385 (D. Mass. 1974). As in this case federal agents were keeping an eye on an aircraft which they believed to be involved in illegal activity. As in this case the pilot said he was going one way, but went another. Also, the pilot would leave one engine running while refueling and pay in cash

which was the other major fact making the agents suspicious. District Judge Freedman found the circumstances suspicious enough to warrant further investigation, but not sufficient to amount to probable cause for an arrest and search. A comparison of the facts in Ciavocco and this case indicates they are of a similar quality. The knowledge Miller had was sufficient to warrant further investigation but not an arrest and search of Riebschlaeger.

II.

The Supreme Court has not passed on the issue of implied bias with regard to jury selection, i.e. whether or not defendants in criminal actions should be forced to trial with jurors who have recently served in other cases of a very similiar nature frequently involving the same government witnesses, the same prosecutor, and the same defense attorney. This issue involves one of our most important federal constitutional guarantees, i.e. the right to an impartial jury under the Sixth Amendment. Therefore, a substantial question is presented for the Supreme Court's consideration.

In Casias v. United States, 315 F2d 614 (10th Cir. 1963), a case affirmed by an equally divided court, the dissenters

used the concept of implied bias based on considerations of policy to find the situation of having prospective jurors who had sat on a similiar but disconnected drug case based on testimony of the same prosecution witnesses denied the defendant on trial his Sixth Amendment right to trial by an impartial jury.

However, the affirming judges in Casias and the other circuits writing on the subject have held "absent some evidence of actual partiality, a juror is not disqualified merely because he previously sat in a similiar case arising out of a separate and distinct set of circumstances even though the offenses charged in the cases are similiar and some of the same prosecution witnesses testify in each case." Government of Virgin Islands v. Williams, 476 F2d 771, 773 (3rd Cir. 1973), United States v. Drake, 494 F2d 648 (7th Cir. 1974), United States v. Williams, 484 F2d 197 (8th Cir. 1973), United States v. Tropeano, 476 F2d 586 (1st Cir. 1973).

Petitioner urges this Court to follow the cogient reasoning of the dissenters in the Casias case. Riebschlaeger was forced to trial with jurors in a drug trafficking case with jurors who had already been exposed to cases resulting in

guilty verdicts for the same sort of offense. Furthermore, Riebschlaeger was forced to trial against a prosecutor who had already established his creditability by obtaining guilty verdicts in the prior cases and with a defense attorney whose creditability had been tarnished by losing guilty verdicts in a prior case. Their prior service could not help but subconciously cause the jurors with prior service to identify with the prosecutor and against Riebschlaeger. Thus, merely asking the jurors if they had any bias was futile; instead, the trial judge should have dismissed the jury as petitioner requested.

Conclusion and Signature

For the reasons set forth above, petitioner respectfully submits that his petition for writ of certiorari should be granted.

_____
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_____
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UNITED STATES of America, Plaintiff-Appellee,

v.

James E. RIEBSCHLAEGER and Ruben Cortez Alaniz, Defendants-Appellants.

No. 75-2149.

United States Court of Appeals, Fifth Circuit.

March 18, 1976.

Defendants were convicted in the District Court for the Southern District of Texas, Owen D. Cox, J., of conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute and they appealed. The Court of Appeals held that fact that many members of panel, from which were chosen the jurors who convicted defendants, had served during the same term of court in criminal cases and had convicted other defendants in cases where the same prosecutor was prosecuting and that some of the members of the jury panel had served on a jury in a case where the defendants' attorney was defending and lost did not require that the entire jury panel be quashed.

Affirmed.

Jury ⇐116

Fact that many members of panel, from which were chosen the jurors who convicted defendants of drug related offenses, had served during the same term of court in criminal cases and had convicted other defendants in cases where the same prosecutor was prosecuting and that some had served on one jury in a case where defendants' attorney was defending and lost did not require that the entire panel be quashed. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 21 U.S.C.A. §§ 841(a), 846.

Appeals from the United States District Court for the Southern District of Texas.

Before BELL, GODBOLD and RONEY, Circuit Judges.*

PER CURIAM:

Appellants were convicted of conspiracy to possess marijuana with the intent to distribute, and possession of 44 pounds of marijuana with intent to distribute, in violation of Title 21 U.S.C.A. §§ 846 and 841(a). We find probable cause and exigent circumstances and therefore no error in denying the motion to suppress based on a claim of an illegal warrantless search. We also find a sufficiency of evidence on the element of intent to distribute.

The other assignment of error raises the point, novel in this circuit, that the entire jury panel should have been quashed because many of the jurors had served during the same term of court in criminal cases and had convicted defendants in cases where the same prosecutor was prosecuting, and some on one jury in a case where defense counsel was defending and lost. No specific bias was

* This opinion was concurred in by Judge Bell prior to his resignation from the Court on March 1, 1976.

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

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asserted as to any particular juror.[1] This contention is without merit. We disagree with the dissenting opinion in *Casias v. United States*, 10 Cir., 1963, 315 F.2d 614, which articulates a concept of implied bias of jurors where the prospective jurors had sat on similar drug cases in the same term of court. The federal decisions are to the contrary. *See, e. g., United States v. Haynes*, 2 Cir., 1968, 398 F.2d 980, 983–86; *Government of Virgin Islands v. Williams*, 3 Cir., 1973, 476 F.2d 771, 773–74; *Belvin v. United States*, 4 Cir., 1926, 12 F.2d 548, 550; *United States v. DeMet*, 7 Cir., 1973, 486 F.2d 816, 819; *United States v. Williams*, 8 Cir., 1973, 484 F.2d 176, 177–178; *United States v. Estrada*, 9 Cir., 1971, 441 F.2d 873, 878–79. *Cf. United States v. Tropeano*, 1 Cir., 1973, 476 F.2d 586; *United States v. Ragland*, 2 Cir., 1967, 375 F.2d 471, 475–76; *United States v. Stevens*, 6 Cir., 1971, 444 F.2d 630. This cause is unlike *Everitt v. United States*, 5 Cir., 1960, 281 F.2d 429, 432, 438, where the same jurors had convicted a co-defendant immediately preceding defendant's trial and had been complimented by the court upon their verdict.

Affirmed.

1. The district court was careful to explore any problem of partiality stemming from prior jury service, as follows:

> Now some of the jurors on this panel have served on other criminal cases during the past several months. You have heard various Government witnesses testify, and some of them may testify in this case. You have observed the Assistant United States Attorney as he has presented the Government's case, and some of you may have sat on cases in which some of the Attorneys representing the Defendants have appeared. Has anything occurred during any prior trial which might cause you to lean in favor of the Defendant or in favor of the Government in this case, or would any of you, because you have heard a particular witness before, tend to believe that witness just because you have heard him testify previously? Do any of you feel that you would have any problem in this regard?
>
> Would you be able to test the credibility of any witness [who] appears and testifies before you in this case and not relate that to any of the testimony that you have heard previously in other cases?
>
> Again, you are the sole judges of the credibility of the witnesses and you are to listen to the testimony in this case, this case alone is the one that you would be concerned about, and it is important if you do feel that you do have a tendency to, perhaps, follow a witness' testimony who has testified before, just because you have heard him testify before, or for any other thing that might have been offered during the trial of the prior case.
>
> I take it that you all feel that you can sit in the jury box if you are chosen, listen to the testimony in this case, and judge the credibility of the witnesses who appear in this case and not let any extraneous influence of any kind affect your fair and impartial judgment in this case. [No response from the jurors.]

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
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No. 75-2149

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES E. RIEBSCHLAEGER and
RUBEN CORTEZ ALANIZ,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the
Southern District of Texas

- - - - -

ON PETITION FOR REHEARING

(May 5 , 1976)

Before GODBOLD and RONEY, Circuit Judges*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of James E. Riebschlaeger in the above entitled and numbered cause be and the same is hereby DENIED.

*Judge Bell was a member of the original panel but resigned from the Court on March 1, 1976 and, therefore, did not participate in this decision.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
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No. 75-2149

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES E. RIEBSCHLAEGER and
RUBEN CORTEZ ALANIZ,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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O R D E R:

James E. Riebschlaeger

IT IS ORDERED that the motion of appellant/filed in the above styled and numbered cause for a stay of the issuance of the mandate pending his petition for writ of certiorari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

We, Douglas Tinker and Donald B. Dailey, Jr., hereby certify that a true and correct copy of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 2nd day of June, 1976, by Certified Mail, Return Receipt Requested.

Douglas Tinker

Donald B. Dailey, Jr.